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In The

Supreme Court of the United States

October Term 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Appellant,

vs.

STATE OF INDIANA, INDIANA COAL ASSOCIATION, MEADOWLARK FARMS, INC., AMAX COAL COMPANY, PEABODY COAL COMPANY, AND JOHN A. CONLON,

Appellees.

On Appeal From The United States District Court For The Southern District Of Indiana

BRIEF FOR AMICUS CURIAE STATE OF IOWA IN SUPPORT OF THE STATE OF INDIANA, et al.

STATE OF IOWA

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TABLE OF CONTENTS

Pages

Authority to File Amicus Brief 1

Interest of Amicus Curiae 1

Summary of the Argument 3

Argument:

I. Section 518(c) of the Surface Mining Act, 30 U. S. C. § 1268(c), violates the Due Process Clause of the Fifth Amendment by requiring payment of administratively-proposed civil penalties as a prerequisite to full administrative hearing. 4

Conclusion 10

TABLE OF AUTHORITIES

CASES:

Armstrong v. Mango, 380 U. S. 545, 552 (1965) 5

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663 (1974) 5, 9

Coffin Bros. & Co. v. Bennett, 277 U. S. 29 (1928) 5

Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594 (1950) 5

Fuentes v. Shevin, 407 U. S. 67, 80 (1972) 5, 6

Garrity v. New Jersey, 385 U. S. 493, 498 (1967) 4

Mathews v. Eldridge, 424 U. S. 319, 333 (1976) 5, 10

National League of Cities v. Usery, 426 U. S. 833, 855 (1976) 3

TABLE OF CONTENTS—Continued

Pages

North American Storage Co. v. Chicago, 211 U. S. 306 (1907) 5

Phillips v. Commissioner, 283 U. S. 589 (1931) 5

Shapiro v. Thompson, 394 U. S. 618, 630-631 (1968) 9

Stanley v. Illinois, 405 U. S. 645, 647 6

Star Coal Co. v. Andrus (S. D. Iowa No. 79-171-2) 14 E. R. C. 1325 (1980) 2

Terral v. Burke Construction Co., 257 U. S. 529 (1922) 4

United States v. Jackson, 390 U. S. 570, 582 (1968) 10

United States v. Pfitsch, 256 U. S. 547 (1921) 5

UNITED STATES STATUTES:

Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1251 *et seq.* 2, 8, 10

Section 405 (c) 2

Section 504 (a) 2

Section 518 (c) 3, 4, 6, 8, 10, 11

Section 521 (a) (3) 6, 8

5 U. S. C. § 554 4

OTHER AUTHORITIES

Chapter 29, Laws of 68th Iowa G. A. (1979 Sess.) 2

45 Fed. Reg. 68, 678 (1980) 2

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AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of Iowa respectfully submits this brief as amicus curiae under the authority of Rule 36.4, United States Supreme Court Rules.

INTEREST OF THE AMICUS

The State of Iowa is directly interested in this Court's ruling on the constitutionality of the procedure for prepayment of civil penalties since the Department of Interior will seek to compel Iowa to institute such a procedure if its

constitutionality is upheld. The United States District Court for the Southern District of Iowa has temporarily enjoined enforcement of this provision in Iowa. *Star Coal Co. v. Andrus* (S. D. Iowa No. 79-171-2), Ruling on Motion for Preliminary Injunction (February 13, 1980), reported at 14 E. R. C. 1325 (1980) (appeal pending).

The Iowa legislature adopted a state surface mining act to meet the requirements for a state program under the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. 1201, *et seq.* (hereinafter SMCRA). Iowa's statute, enacted as chapter 29, Laws of 68th Iowa G. A. (1979 Sess.), does not require operators to pay proposed penalties into an escrow account prior to hearing. The Secretary of Interior issued a "Partial Approval/Partial Disapproval of the Permanent Program Submission from the State of Iowa" on October 16, 1980, in which he indicated that the State would be required to provide for prepayment of civil penalties if the injunction in *Star Coal Co. v. Andrus, supra,* were dissolved. 45 Fed. Reg. 68, 678 (1980). If the State program were disapproved, federal enforcement would replace state regulation of this industry under section 504(a), SMCRA, and the State would be ineligible for funding for abandoned mine reclamation under section 405(c), SMCRA. To avoid the threatened loss of state regulation, Iowa might be compelled to require prepayment of penalties as a prerequisite to administrative or judicial hearings. This compulsion on the State to require its citizens to pay penalties in advance of hearing in state tribunals directly impinges on the State's authority to conduct its own governmental functions.

> Congress may not exercise the power [the Commerce Clause] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

National League of Cities v. Usery, 426 U. S. 833, 855 (1976). The State is concerned that many future federal-state programs may similarly deprive the States of their authority to provide minimum procedural safeguards.

SUMMARY OF ARGUMENT

The government may not constitutionally charge one with a violation of law and then compel the advance payment of civil penalties as a precondition to a hearing. The risk of erroneous deprivation of property is high given the subjective criteria for penalty assessments. Not only does section 518(c) deny the right to a hearing for those who cannot afford to immediately pay but it has chilling effects on other fair hearing rights as well. This deliberate deprivation of property rights prior to a hearing serves no significant governmental purpose but instead imposes an impermissible burden on the right to a fair hearing.

ARGUMENT

I. Section 518 (c) of the Surface Mining Act, 30 U. S. C. § 1268 (c), violates the Due Process Clause of the Fifth Amendment by requiring payment of administratively-proposed civil penalties as a prerequisite to full administrative hearing.

Section 518(c), SMCRA, compels a miner to pay the full amount of a proposed penalty within thirty days of the issuance of an administratively proposed assessment. Although section 518(b) states that a civil penalty shall be assessed only after a full adjudicatory hearing conducted pursuant to 5 U. S. C. § 554, section 518(c) requires payment in advance of hearing and specifically states, "Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

The issue in this case is whether Congress may constitutionally condition the opportunity for either a hearing or judicial review to contest civil penalties upon prior immediate payment of the penalty proposed by the enforcing agency. There is clearly no waiver of the right to a prior hearing since the miner has absolutely no choice but to pay in order to have a hearing. *See Terral v. Burke Construction Co.*, 257 U. S. 529 (1922) (State cannot condition foreign corporation's right to do business on waiver of constitutional right to resort to federal court).

> Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

Garrity v. New Jersey, 385 U. S. 493, 498 (1967).

Amicus State of Iowa urges that requiring such payment as a precondition to receiving a hearing deprives persons assessed with civil penalties of their right to be heard in violation of due process clause of the Fifth Amendment. If due process means anything it means that "'Parties whose rights are to be affected are entitled to be heard. . . .' * * * It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Mango,* 380 U.S. 545, 552 (1965)). *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976).

The proper time for hearing is prior to the taking or deprivation of property or liberty. *Fuentes v. Shevin, supra,* 407 U.S. at 81-82. The Court has recognized that in certain exigent circumstances due process is not denied when notice and hearing are postponed and the government acts summarily. *North American Storage Co. v. Chicago,* 211 U.S. 306 (1907) (seizure of contaminated food to protect public health); *Coffin Bros. & Co. v. Bennett,* 277 U.S. 29 (1928) (bank failure); *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) (misbranded drugs); *Phillips v. Commissioner,* 283 U.S. 589 (1931) (collection of taxes); *United States v. Pfitsch,* 256 U.S. 547 (1921) (to aid in war effort); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (seizure for forfeiture of vessel carrying contraband). However, in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Court identified three factors to be considered in identifying what is required by due process:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous de-

> privation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The statute clearly deprives one of a property interest by compelling the payment of money. The escrow procedure also permanently deprives those who lack adequate liquid assets to pay in the short time provided of any right to a hearing. It is no answer that the statute requires a refund with interest (at the greater of 6 percent or current treasury rate) if the penalty is ultimately lowered. Even those who can afford to pay the proposed penalty will not be compensated for lost opportunities should the penalty be vacated. "This Court has not . . . embraced the general proposition that a wrong can be done if it can be undone." *Fuentes v. Shevin,* 407 U. S. 67, 82 (1972), quoting *Stanley v. Illinois,* 405 U. S. 645, 647.

The penalty prepayment procedure also directly discourages miners from challenging a notice of violation or an order for abatement issued under section 521(a)(3). Since the Secretary is required to consider the good faith of the person in attempting to achieve rapid compliance after notice of violation in setting a penalty, section 518 (a), and since the Secretary is required to assess the proposed penalty within thirty days of the notice of violation under section 518(c), a miner who decides to challenge an order of abatement must recognize that his challenge may affect the agency's contemporaneous decision whether to assess a penalty. The statute also creates a bureaucratic

incentive to reaffirm the agency's predetermined conclusions and to maximize the penalty to the operator. Without opportunity for input by the accused, the inherent human tendency will be for the agency to decide that its original determination of violation is correct. There is less chance it will err on the conservative side in proposing penalty amounts. The nature and purpose of penalties combined with the nature of the agency's function in assessing and enforcing them result in a bureaucratic incentive to maximize proposed penalties. It is also clear that under the statutory scheme it becomes increasingly difficult to exercise a party's "right" to an evidentiary hearing as proposed penalties increase. Thus the result may well be a reversal of the normal likelihood that higher penalties would tend to induce requests for hearings, and the agency would be able to discourage hearings by increasing proposed penalties. The final result is likely to be substantively affected even if a hearing is finally held. Clearly any administrative law judge will know that the amount has been proposed by the agency and paid in full into escrow or there would be no hearing. The decision will therefore be whether to modify the proposed penalty rather than what penalty would be independently appropriate after consideration of the evidence from all parties.

The risk of erroneous deprivation is high. If the prepayment is not made the statute denies all right to contest either the fact of violation or the amount of penalty. Any person unable to make the prepayment will be required, ultimately, to pay the full penalty, however wrongfully determined.

The fact that proposed penalties are also based on subjective determinations increases the risk of error.

Even the fact of violation is dependent upon observations of inspectors in the field. The statutory standards to be considered in determining the amount of a penalty are inevitably subjective:

> the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Section 518(a), 30 U. S. C. § 1268(a). These factors must be determined by evidentiary hearing to reduce the risk of error.

In other cases cited above in which a deprivation of property prior to final hearing was upheld there was always an overriding governmental necessity calling for expeditious action. These cases called for emergency action because later action would be impossible, fruitless or simply too late. No such necessity exists here. Prepayment of penalties does not prevent continuing environmental harm; that purpose is served by cessation orders under section 521(a)(2). Even the necessity of protecting the nation's revenue cannot be utilized in justifying the prepayment requirement. The penalty provision was not enacted as a revenue raising measure. Indeed, ideally, if there were complete compliance with the Act, it would raise no revenue at all. In fact the statute simply permits some persons to contest proposed penalties and others not—depending upon whether they can raise the funds in thirty days.

Less intrusive means exist to expedite the collection of penalties. Section 509 already requires operators to post bonds conditioned on compliance with the statute. Unlike taxation which is applicable to all, these penalties would be imposed on miners only, a relatively small group with sufficient capital investment that they are unlikely to remove all their property from the jurisdiction to avoid payment of penalties. Cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 676-80 (1974) (vessels subject to forfeiture might be removed from jurisdiction, preventing forfeiture proceedings). If the purpose is solely to increase the deterrent effect by causing greater economic harm at an earlier stage to all who may have violated the Act, such is a constitutionally impermissible objective. By analogy to criminal law, the increased deterrent effect of speedy punishment does not justify the elimination of procedural protections designed to distinguish those deserving of punishment from those who are not. In the taxation, forfeiture, and emergency action cases, governmental interests require the temporary deprivation of property interests prior to any hearing. In none of those situations did the government deliberately condition the right to a hearing on the prior deprivation of a property interest. *See Shapiro v. Thompson*, 394 U. S. 618, 630-631 (1968) (State may not impose residency requirement to deter right to travel).

> If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.
>
> • • •
>
> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the

> exercise of basic constitutional rights. Cf. United States v. Robel, 389 U. S. 258, 19 L. ed. 2d 508, 88 S. Ct. 419; Shelton v. Tucker, 364 U. S. 479, 488-489, 5 L. ed. 2d 231, 237-238, 81 S. Ct. 247. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

United States v. Jackson, 390 U. S. 570, 582 (1968).

CONCLUSION

In summary none of the three *Eldridge* factors would allow the penalty scheme in the statute. The private interest is great. There is no overriding governmental necessity or need. The risk of erroneous deprivation is potentially great. This is the very type of determination in which fundamental fairness—due process—demands that an individual about to be penalized should have an opportunity to participate *prior* to deprivation. Indeed, even in cases where this Court has allowed something less than a full hearing *prior* to the deprivation at some point in time the individual has had an opportunity for that hearing. Under Section 518 (c), 30 U. S. C. § 1268 (c) there may often be a denial of any hearing right at all rather than mere postponement. Amicus State of Iowa urges the Court to affirm the holding of the court below that Section

518 (c) violates the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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